APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 676, 677, 684, 688, 730, 762, 763, 796—
September Term, 1973.
(Argued February 14, 1974 & Decided May 7, 1974.)
Docket Nos. 73-2426, 73-2615, 73-2554, 73-2796,
73-2555, 73-2644, 73-2645, 73-2635

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

ALPHONSE CIRILLO, VINCENT MURPHY, SALVATORE SORRENTINO, ROBERT VENETUCCI, FRANCISCO GUTIERREZ, THEODORE ALFRED LILIENTHAL, LAWRENCE JOHN CESARE and ABE GABER,

Defendants-Appellants.

Before:

Medina, Mansfield and Oakes,

Circuit Judges.

Appeals from judgments entered after a jury trial in the United States District Court for the Eastern District of New York, Orrin G. Judd, *Judge*, convicting (1) all appellants of conspiracy to distribute narcotics in violation of 21 U.S.C. §846, (2) Alphonse Cirillo, Vincent Murphy, Robert Venetucci and Theodore Lilienthal of possession of narcotics with intent to

distribute in violation of 21 U.S.C. §841, (3) Alphonse Cirillo, Vincent Murphy, Robert Venetucci, and Salvatore Sorrentino of attempting to distribute narcotics in violation of 21 U.S.C. §846, (4) Alphonse Cirillo, Vincent Murphy, Salvatore Sorrentino, and Theodore Lilienthal of distribution of narcotics in violation of 21 U.S.C. §841(a)(1), and (5) Lawrence Cesare of attempting to possess narcotics in violation of 21 U.S.C. §846.

The convictions of Gutierrez and Gaber are reversed. All other convictions are affirmed.

HAROLD BORG, Esq., Kew Gardens, N.Y. (Arnold E. Wallach, Esq., of counsel) *for Appellant Cirillo.*

STEPHEN R. LAIFER, Esq., Brooklyn, N.Y., *for Appellant Murphy.*

IRVING SABLE, Esq., Far Rockaway, N.Y., *for Appellants Sorrentino and Cesare.*

JACOB P. LEFKOWITZ, Esq., New York, N.Y., *for Appellant Venetucci.*

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GUY L. HEINEMANN, Assistant United States Attorney (Edward John Boyd, V, United States Attorney for the Eastern District of New York, Raymond J. Dearie, Assistant United States Attorney, Brooklyn, N.Y., of counsel), *for Appellee.*

MANSFIELD, *Circuit Judge:*

On this appeal we encounter a narcotic distribution conspiracy of the familiar "chain type" involving sophisticated suppliers, middlemen and customers who dealt in substantial amounts of heroin, conducting their business through use of coded narcotics trade language or jargon in which innocent phrases were used to describe heroin, prices and parties. After a jury trial before Judge Orrin G. Judd of the Eastern District of New York all appellants were found guilty of conspiracy to distribute heroin in violation of 21 U.S.C. §846 (Count 9). Additionally appellants were convicted on other counts as follows:

Counts	*Appellants*[1]
1: (possession with intent to distribute 1 kilogram of heroin)	Cirillo and Murphy

1. Appellants were sentenced as follows:

Cirillo — 14 years, 9 months on Counts 1 and 2 (concurrent) and 10 years special parole; 10 years on Counts 7 and 9 (concurrent but consecutive to

2: (distribution of the same kilogram of heroin)	Cirillo, Murphy and Sorrentino
3 and 4: (possession of the same kilogram with intent to distribute and attempted distribution)	Venetucci
5 and 6: (possession and distribution of 1/2 kilogram of heroin)	Lilienthal
7: (attempted distribution of the 1/2 kilogram)	Cirillo, Murphy and Sorrentino

sentences on Counts 1 and 2) and 10 years special parole; $10,000 fine on Count 9.

Murphy — 10 years on Counts 1, 2, 7 and 9 (concurrent) and 7 years special parole; $5,000 fine on Count 9.

Sorrentino — 10 years on Counts 2, 7 and 9 (concurrent) and 7 years special parole; $5,000 fine on Count 9.

Venetucci — 9 years on Counts 3, 4 and 9 (concurrent) and 7 years special parole.

Lilienthal — 8 years on Counts 5, 6 and 9 (concurrent) and 5 years special parole; $2,500 fine on Count 9.

Cesare — 5 years on Counts 8 and 9 and 5 years special parole.

Guitierrez — 5 years on Count 9 and 5 years special parole.

Gaber — 5 years on Count 9 and 5 years special parole.

Presently all appellants except Cirillo are free on bail pending decision of their appeal.

8: (attempt to possess the 1/2 kilogram) Cesare

Finding insufficient evidence of guilt, we reverse the convictions of appellants Gutierrez and Gaber. The convictions of all the other appellants are affirmed.

The government's proof consisted largely of tapes and transcripts of some 40 intercepted conversations occurring over the home telephones of Cirillo and Sorrentino, supplemented by testimony of surveilling agents and a video tape of a meeting of four of the conspirators. Initial authorization for the wiretap of Cirillo's phone was given in a warrant order issued on October 31, 1972, by Justice J. Irwin Shapiro of the New York State Supreme Court, Appellate Division, pursuant to New York's eavesdropping statute, N.Y.C.P.L. §§700.05, *et seq.*, after he found on the basis of affidavits submitted by the Kings County District Attorney and a state police detective, that there was probable cause to believe Cirillo was committing narcotics offenses and that evidence of these offenses could be obtained by wiretapping Cirillo's phone. This warrant was extended for four additional 30-day periods by Justice Rabin of the Appellate Division.

Initial authorization for the wiretap of Sorrentino's phone was given in a warrant issued on January 25, 1973, pursuant to the New York statute by Justice Irwin Brownstein of the New York State Supreme Court, which was extended for two additional 30-day periods.

The evidence, viewed in the light most favorable to the government, reveals the following: At 7:00 A.M. on January 18, 1973, Cirillo called Sorrentino and said he wanted to see

Sorrentino and "Bobby" (Venetucci). Later that morning Sorrentino and Venetucci spent two hours at Cirillo's home in Little Neck, New York. Thereafter Sorrentino phoned Cirillo to ask whether he should "take the kid out of school" at around 4:00 P.M., to which Cirillo replied, "No, its figured most likely, like the kids going to school tonight." James Garcia, a detective with the New York City Police Department, testified, on the basis of his extensive experience in narcotics investigations, that he would interpret the "kids going to school" language as narcotics coded vocabulary for delivering narcotics.

As the result of a further phone call Cirillo, carrying a rolled up brown paper bag, a type of unobstrusive container frequently used for transportation of narcotics, and accompanied by Murphy, met at 10:30 P.M. with Sorrentino at the apartment of the latter's mother on West 8th Street where they were joined by Venetucci, who arrived at about 11:30 P.M. and left 15 minutes later. Venetucci drove directly to 120 Bay 14th Street in Brooklyn where he met appellant Frank Gutierrez on the street. Both then spent two hours in Gutierrez's apartment, following which Venetucci returned to West 8th Street and Avenue U, where he was seen arguing on the street with Sorrentino, Cirillo, and Murphy.

On the next day, January 19, a series of phone conversations between Cirillo and Sorrentino (during one of which "Bobby" Venetucci was present on Sorrentino's end of the wire) revealed that the argument had arisen because of Venetucci's failure to come up with the money for the narcotics that had been delivered to him the night before by Cirillo, Murphy, and Sorrentino. Venetucci had been unable to locate his "partner" who was supposed to make payment. Sorrentino reported to Cirillo that although Venetucci called from "Bay 14th"

(Gutierrez's address), the money had not been received. Sorrentino assured Cirillo that he had told "Bobby" (Venetucci) that Cirillo would not take the "thing" back but wanted the agreed price of $30,000. (At that time the market price for a kilogram of 50% pure heroin ranged from $25,000 to $38,000.) In an effort to obtain the purchase price, a meeting was held that night between Cirillo, Murphy, and Sorrentino, followed by a Sorrentino-Venetucci meeting. The upshot was that while "Bobby" (Venetucci) was finally able to reach his partner "Frankie" by telephone, neither "Bobby" nor "Frankie" could produce the money. Meanwhile Sorrentino expressed concern that the "stuff" (narcotics) was still in Venetucci's house.

The efforts to obtain payment of the $30,000 price for the narcotics continued with Cirillo, the supplier, putting pressure on Sorrentino, the middleman, and the latter in turn pressing Venetucci, who supposedly was looking to his "partner" for payment. On the afternoon of January 22, Venetucci went to Grace's Discount Dress Shop on 11th Avenue in Brooklyn, owned by the wife of Gutierrez, and shortly thereafter Gutierrez entered. Two hours later Venetucci left the shop but returned within a half hour when, before reentering, he walked up and down the opposite side of the street in an apparent effort to determine whether he was being followed. Venetucci finally left the shop at 6:00 P.M. and proceeded in his automobile to Staten Island, driving evasively when he spotted surveillance agents behind him.

By January 25, still unpaid, Cirillo and Sorrentino, who were beginning to lose their patience, resolved to give "Bobby" (Venetucci) a "good workout" and then get the "dress off him" (i.e., secure the return of the narcotics). In this they succeeded, for on the evening of January 26 Sorrentino, Murphy, and

Cirillo, who was carrying a brown paper bag, all entered Sorrentino's house in Brooklyn. Three days later Venetucci was told by Sorrentino that "they got rid of it for 22" (i.e., sold the narcotics for $22,000), leaving an $8,000 balance, which Venetucci and his partner were expected to pay. Negotiations regarding the $8,000 deficit followed, with Venetucci trying to persuade Cirillo and the "other guy" to absorb half the loss on the understanding that Sorrentino and Venetucci would make up the other half. Cirillo, however, kept insisting that Sorrentino, Venetucci and "Frankie" pay the entire $8,000.

Discouraged but apparently not resolved to abandon their business relationship, Sorrentino and Cirillo, on March 9, 1973, began discussing another transaction. At 5:45 P.M. on that date Sorrentino advised Cirillo by phone that he had "met some nice people" who thought the "figure" for the "dresses" (i.e., the price for narcotics offered by Cirillo and Sorrentino) was "very good." Several days later, on March 14th, Sorrentino called Cirillo and ordered another "dress" which, according to Detective Garcia, meant another order of narcotics. At this point Cesare, the prospective purchaser, appeared on the scene and asked Sorrentino for delivery of "a sample of that dress." Upon receiving this message from Sorrentino, Cirillo went into action. He called Lilienthal's home and, upon learning that "Ted" (Lilienthal) was not expected home until 7:00 P.M., left a message instructing Ted to bring him back "those income tax forms, the one . . . half filled out . . ." (i.e., a half-kilo of heroin). With a view to making the purchase Cesare, accompanied by Gaber, proceeded to the White Castle parking lot near Sorrentino's home where they waited in vain for 3 1/2 hours for the narcotics to be supplied by Lilienthal and departed only after Sorrentino and Cirillo were unable to locate the supplier (Lilienthal).

On the following day, March 15th, Cirillo reached Lilienthal by phone and in response to his request for the "paper that I half filled out" (half-kilo of narcotics) Lilienthal indicated that he had it. Shortly thereafter Lilienthal visited Cirillo's residence, apparently for the purpose of delivering the half-kilo. Cirillo then called Sorrentino to advise that he and "Murph" would go to Sorrentino's residence. Sorrentino then told Cesare, the prospective customer for the half kilo, to call back some time after 7:30 P.M.

At 7:15 P.M. on March 15th Cirillo and Murphy, intending to rendezvous with Sorrentino for the narcotics delivery, entered the parking lot near Sorrentino's house where they were promptly arrested by federal narcotics agents and New York police. A search revealed a half kilo of heroin and small quantities of cocaine in their possession. The area was quickly cleared in order not to arouse Sorrentino's suspicions. At 8:00 P.M. Sorrentino informed Cesare by phone that he was still waiting for his "friends" (i.e., Cirillo and Murphy) to get there.

At approximately 10:00 P.M. on March 14th Cesare, the prospective customer, together with Gaber and an individual identified as Jerry Collins, arrived at Sorrentino's house. Cesare and Gaber went inside and exited with Sorrentino at 10:15 P.M. Sorrentino talked with Cesare, Gaber and Collins in the parking lot outside his house for about 45 minutes before he got in his own car and drove around for approximately a half hour. When Sorrentino returned, all four men went to a nearby restaurant until approximately midnight when, after making a call from a nearby public telephone booth, Sorrentino went back into his residence and the other three men drove off in their car. At this point the car driven by Cesare was stopped by a narcotics agent and, when all the occupants were asked to produce iden-

tification. Gaber said that they were only in the area to see "Brother." Cesare added, "[Y]eah, Brother Salvatore Sorrentino."

In addition to the tapes and transcripts and the testimony of the surveilling agents, the government introduced the items seized from Cirillo and Murphy on the evening of March 15th, which included the brown paper bag, bag of half kilo of heroin, a small bag of cocaine taken from Cirillo, and a small amount of cocaine wrapped in tin foil that had been taken from Murphy.

On July 27, 1973, the jury returned a verdict finding all appellants guilty of conspiracy to distribute narcotics and various appellants guilty of narcotic offenses as shown above. However, Gutierrez was found not guilty of attempting to possess narcotics in connection with the January transaction and Gaber was found not guilty of attempting to possess narcotics in connection with the March transaction. We turn to the numerous claims of error asserted on this appeal.

DISCUSSION

Use of Wiretap Evidence

Several appellants challenge the constitutionality of the New York State eavesdrop statute, N.Y.C.P.L. §§700.05, *et seq.* However, the provisions of that statute are authorized by and conform to similar provisions of the federal wiretap statute, Title III of the Omnibus Crime Control and Safe Streets Act of 1968, see 18 U.S.C. §§2516(2), 2518 (1970), which we held to be constitutional in *United States v. Tortorello*, 480 F.2d 764 (2d Cir.), *cert. denied*, 414 U.S. 866 (1973). See also *United States v. Giordano*, 469 F.2d 522 (4th Cir. 1972), *cert. granted*, 411

U.S. 905 (1973). For the reasons stated in *Tortorello* we reject the constitutional claim and turn to the other wiretap issues raised by appellants.

(a) *Validity of Original Wiretap Order*

The first warrant order authorizing a wiretap of Cirillo's home phone, which was issued on October 31, 1972, and broadly authorized interception until November 29, 1972, of communications of types particularly described, contained no direction that the interception should be conducted "in such a way as to minimize the interception of communications not otherwise subject to eavesdropping," as required by §700.30(7) of the statute, see N.Y.C.P.L. §700.30(7).[2] Several appellants join in Cirillo's argument that the omission of a minimization directive rendered this initial order fatally defective so that any conversations intercepted as a result of it or its subsequent extensions[3] should have been held inadmissible at trial. We disagree.

The first six paragraphs §700.30 of the state statute limit the

2. Section 700.30 provides:

"An eavesdropping warrant must contain:

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"7. A provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to eavesdropping under this article, and must terminate upon attainment of the authorized objective, or in any event in thirty days;. . . ."

3. Since the application for these extensions was based on conversations intercepted as a result of the first order, if the first order were invalid, the subsequent extensions would be "tainted" by the primary illegality.

scope of an eavesdropping warrant by requiring it to specify, among other things (1) the name of the person, if known, whose communications are to be intercepted, (2) the nature and location of the communications facilities as to which authority to intercept is granted, (3) a particular description of the type of communications sought to be intercepted, (4) a statement of the particular designated offense to which they relate, (5) the identity of the law enforcement agency authorized to intercept the communications, and (6) the period of time during which the interception is authorized. Paragraph 7 then provides that the warrant must also contain the above-quoted direction to "minimize" the interception of non-pertinent conversations. Recognizing that paragraph 7 is essentially a summation of "the more specific requirements of 700.30(1)-(6), all of which lead to 'minimization,' " we held in *United States v. Manfredi*, Slip Opin. at 5593, 5611-12 (2d Cir. Nov. 23, 1973), that, when the orders and supporting affidavits are construed in "a commonsense and realistic fashion," see *United States v. Ventresca*, 380 U.S. 102, 108 (1965), mere omission of the "talismanic minimization language" from a wiretap order otherwise in compliance with the statute would not render the warrant invalid under state law, which governs, at least where the supporting affidavits evidenced an actual knowledge of the minimization requirement and an agreement to abide by it. See *People v. Solomon*, 346 N.Y.S.2d 938, 941 (Sup. Ct. 1973). While here the supporting affidavits contained no specific agreement "to limit the seizure of conversations to those specifically pertaining to the [alleged] Penal Law violations," as the affidavit did in *Manfredi*, there is other convincing evidence that the officers conducting the wiretap were aware of the minimization requirement and abided by it.

The investigation of Cirillo was conducted jointly by the

District Attorney for Kings County and the Federal Bureau of Narcotics and Dangerous Drugs (BNDD). Martin Hershey, the assistant in charge of the Narcotics Bureau in the King's County District Attorney's Office who directed the investigation, Alexander Dovetko, a special agent with BNDD who supervised the federal agents engaged in the investigation, and Guy Heinemann, the Assistant United States Attorney for the Eastern District who also participated in the joint investigation, all submitted affidavits stating that they were aware of the minimization requirement before the first Cirillo warrant was obtained and that minimization instructions were given to the officers and agents conducting the tap, who were ordered to turn off all recording and listening devices whenever they were able to determine that nonpertinent conversations were being intercepted. Agent Dovetko visited the Cirillo wiretap almost daily from its inception and personally observed agents and officers complying with these instructions. Furthermore, during the period covered by the first warrant, the listening and recording of over a quarter of the completed calls was terminated as soon as nonpertinency was determined.[4] These logs, which we have reviewed, support Dovetko's conclusions.[5]

In other contexts New York appellate courts have excused purely technical defects in the form of a search warrant that has

4. The affidavit stated that "[o]f 496 telephone calls made or received, 120 were incomplete (no answer, busy or wrong number). Approximately 287 were listened to completely and approximately 93 were listened to only initially and then turned off when it was determined that they were non-pertinent."

5. Termination for non-pertinency is indicated on the logs by the letters "N/P." Whenever these letters appear, there is no further description of the conversation in the log and the log indicates, by showing that only one or two feet of tape elapsed during that particular interception, that the recording and monitoring devices were shut off as soon as the determination of non-pertinency had been made.

been executed according to statutory requirements. Compare *People v. Glen*, 30 N.Y.2d 252, 331 N.Y.S.2d 656, *cert. denied sub nom. Baker v. New York*, 409 U.S. 849 (1972) (the "fact that the warrant would on its face authorize an improper search does not undo it for all purposes") with *People v. Varney*, 32 App. Div. 2d 181, 301 N.Y.S.2d 330 (1969) (technical defects may be overlooked where search is conducted lawfully). The omission of a minimization directive was a "technical defect" under the circumstances of this case where its absence could not, assuming proper attention to the provisions of the warrant, lead to a greater invasion of privacy than was justified by probable cause. Cf. *Smith v. United States*, 360 U.S. 1, 9 (1959) (deficiencies are "technical" where no substantial rights are involved). Since the first order in this case was in "substantial compliance" with the statute we hold that it was valid. Compare *Manfredi, supra*, with *United States v. Poeta*, 455 F.2d 117, 121 (2d Cir.), *cert. denied*, 406 U.S. 948 (1972) and *United States v. Rizzo*, Slip Opin. at 1675 (2d Cir. Feb. 7, 1974).

b) *Failure to Hold a Minimization Hearing*

Appellants next argue that the district court should not have denied their motions to suppress the wiretap evidence without first holding an evidentiary hearing to determine whether minimization had in fact been achieved during the entire course of the wiretap of the Cirillo and Sorrentino phones. In denying the motions to suppress the district court relied on the Dovetko, Hershey and Heinemann affidavits and on his own review of the logs kept during the Cirillo and Sorrentino wiretaps.

The affidavits disclose in detail a clear awareness of and adherence to the minimization requirement. The Dovetko affidavit showed further that at all times the Cirillo and Sorrentino

wiretap plants were actively manned and that of the 2774 conversations initially intercepted only 1526 conversations were listened to completely, "the agents and officers having believed at the time that the [1526] conversations were pertinent to narcotics trafficking or other criminal activity."[6] Despite the ample opportunity to review the detailed and complete logs, which were made available, and to compare them with the tapes, which were also made available, appellants made no attempt to challenge the foregoing statistics or to show that any of the conversations listened to were nonpertinent to the government's investigation. In light of this failure, we hold that the affidavits supplemented by the logs and tapes were sufficient to establish a prima facie showing of compliance with the

6. The affidavit stated:

"Special Agent Nicholas Alleva and Special Agent William Malarney, have reviewed the logs for both the Cirillo and Sor...tino wiretaps for their entire periods of interception. They have analyzed those wiretaps to assist the Court in determining whether there was proper minimization. On the Cirillo wiretap plant, approximately 1496 telephone calls were made to or from the Cirillo telephone. Of these, 297 were incomplete (busy, no answer, or wrong number). This leaves approximately 1199 actual telephone conversations. Of these, 688 were listened to completely, the agents and officers having believed at the time that the conversations were pertinent to narcotics trafficking or other criminal activity. 511 telephone calls were initially listened to and determined to be non-pertinent whereupon they were not recorded or listened to. In some instances, some of these telephone conversations were relistened to periodically to determine that the conversations continued to be non-pertinent. On the Sorrentino wiretap plant operation, approximately 2184 telephone calls were made to or from the Sorrentino phone. Of these, 599 were incomplete (busy, no answer, or wrong number), leaving approximately 1585 actual telephone conversations. Of these, 838 were listened to completely because they were believed to be pertinent at the time, 747 were initially listened to and determined to be nonpertinent whereupon they were not recorded or listened to. In some instances, some of these telephone conversations were re-listened to to insure that they continued to be nonpertinent."

statutory minimization directive. See *United States v. Rizzo*, Slip Opin. at 1491-95 (2d Cir. Jan. 17, 1974). Indeed, the prima facie showing is even stronger here than in *Rizzo*, which also upheld a wiretap conducted pursuant to the New York statute. There the state police detective who supervised the wiretap merely asserted at a suppression hearing that both monitoring and recording were stopped when it had been determined that a conversation was "not pertinent." While logs had been kept, no attempt was made to present a detailed analysis of these logs, as did the Dovetko affidavit here.

The affidavits submitted to the district court, supplemented by the logs, were more than adequate to show a good faith effort to achieve minimization.[7] In the absence of any evidence that a substantial number of nonpertinent conversations had been intercepted unreasonably, the court was justified in denying appellants' suppression motions without holding a full adversary-type hearing.

(c) *"Expert" Interpretation of Narcotics Jargon*

Appellants, in the intercepted telephone conversations, never referred explicitly to heroin or narcotics but used such code words and terms as "kids out of school," "stuff," "dresses," or "half filled out income tax forms." New York City Police Detective Garcia, who had participated in over 100 narcotics

7. Even assuming *arguendo* that some of the conversations completely listened to were in fact nonpertinent, the surveillance would not necessarily have violated the minimization requirement of the statute, assuming a good faith effort had been made to achieve such minimization. Compare *United States v. Bynum*, 485 F.2d 490, 500-02 (2d Cir. 1973) with *United States v. Fino*, 478 F.2d 35 (2d Cir. 1973) and *United States v. Tortorello*, 480 F.2d 764 (2d Cir. 1973).

investigations and had testified as an expert interpreter of narcotics jargon in five different narcotics cases, testified that in his opinion these terms were being used by appellants as disguised references to narcotics. Appellants do not object to Garcia's qualifications but argue that his interpretations should have been excluded as mere speculation or an invasion of the province of the jury. A similar argument was rejected by us in *United States v. Borrone-Iglar*, 468 F.2d 419, 421 (2d Cir.), *cert. denied*, 410 U.S. 927 (1972). We see no reason to depart from that holding here, particularly since the district court instructed the jury that it was not obliged to accept Garcia's interpretations and was free to draw its own conclusions concerning the meaning of the words used by appellants.

(d) *"Surprise" Disclosure of Venetucci Conversations*

Venetucci attacks the introduction at trial of two conversations between him and Sorrentino, which were intercepted shortly after the wiretap of Sorrentino's phone had begun on January 29, 1973. The basis for this objection is the failure of the prosecutor, Assistant U.S. Attorney Heinemann, to make any pretrial disclosure that these conversations had been intercepted.

Venetucci alleges that Heinemann represented to him on two occasions that none of the government's tapes or transcripts contained any conversation participated in by Venetucci. The first occasion was on May 17, 1973, when, in response to discovery motions, Heinemann agreed to furnish not only the wiretap orders with their supporting affidavits but also those transcripts of tapes that had actually been compiled, and to make all tapes and logs available for listening and inspection. Although Heinemann is alleged to have stated on that date that

none of the government's tapes contained any Venetucci conversations, Heinemann did not recall having made any such statement. Before trial Heinemann, after stating that he expected all "of the conversations now intended to be used by the government in its direct case to be forwarded to defense counsel," furnished to Venetucci's counsel approximately 90 transcripts of tape recorded conversations. The second occasion occurred after the trial had begun on July 9 when Venetucci's counsel moved for a mistrial on the ground that Heinemann had implied in his opening statement to the jury that the government actually did have tapes of Venetucci's conversations which would incriminate him.[8] However, responding to the court's inquiry as to whether he meant to refer to wiretaps of Venetucci conversations, Heinemann had said "No, I don't think there is anything I said to indicate that."

Heinemann did not disclose that tapes of Venetucci conversations existed until the fifth day of appellants' trial when he informed the court that he had discovered the tapes on the previous evening in reviewing the logs kept during the Sorrentino wiretap. Heinemann subsequently offered, and the district court admitted, the transcripts and tapes of two conversations between Sorrentino and Venetucci which occurred on January 29, 1973 and on February 1, 1973, respectively, concerning their joint

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8. In moving for a mistrial, counsel for Venetucci referred to Heinemann's statement that:

> "Later it became clear exactly how much money was to be paid for the heroin that was brought to Sorrentino's mother's house that night (i.e. January 18). $30,000. And $10,000 was ultimately the payment that was demanded. Bobby Venetucci, as a sign of his good faith. This we know because the defendants talked about it on the telephone, and the telephone of Alphonse Cirillo during January, 1973, was under electronic surveillance by court order."

obligation to make up to Cirillo the $8,000 deficit resulting from the sale of the first lot of narcotics at $22,000 instead of the $30,000 which Venetucci was to pay for it. Venetucci argues that he was prejudiced by this delayed "bombshell" because (1) he was denied any opportunity to participate in a pretrial suppression motion and (2) his counsel was misled in the preparation of his own opening statement, where he emphasized that, despite the government's extensive electronic surveillance, no Venetucci conversation had been intercepted.

We agree with Venetucci that the government should have produced the transcripts of his conversations with Sorrentino prior to trial in response to his explicit discovery requests, see *United States v. Crisona*, 416 F.2d 107 (2d Cir. 1969), *cert. denied*, 397 U.S. 961 (1970). However, we are persuaded that Heinemann's representations were in good faith and resulted from oversight on the government's part. We further doubt that Heinemann categorically conceded on May 17 that none of the one or two-hour reels in the government's possession, of which there were approximately 200, contained any Venetucci conversations.

At least two and a half months before trial the government made the logs of the Cirillo and Sorrentino wiretaps readily available to defense counsel. Our review of these logs reveals that identification of each caller is neither difficult nor particularly time consuming. In each instance where a call was intercepted the log entry identified the parties (where identifiable) before giving a brief description of the conversation. Indeed, on the very third page of the Sorrentino logs there is a log entry, highlighted by two asterisks, which reads, "MO *Bobby*, MI *Brother—Bobby* and *Brother* discuss 'kilo' they took a loss on. . . ."[9] (emphasis

9. "MO Bobby, MI Brother" is shorthand for Male/Out (i.e., male calling from outside) to Male/In (i.e., male inside receiving call).

added). All counsel were at all times aware that "Bobby" and "Brother" were the nicknames for Venetucci and Sorrentino, respectively.

Even assuming that Venetucci was misled by the government into believing that there were no tapes of his conversations—an assumption that is somewhat implausible, since he probably knew that he had talked with Sorrentino over the latter's phone—no real prejudice is shown. His claim that the delayed disclosure denied him the opportunity to make his own pretrial attack on the validity of the wiretap orders or on the conduct of the wiretap operation[10] borders on the frivolous. Nothing prevented his doing so, once the transcripts were offered. Yet he failed even to ask for an adjournment or continuance. Nor did the apparent contradiction of his counsel's opening statement by the two Venetucci-Sorrentino taped conversations call for a mistrial. See *United States v. Allsenberrie*, 424 F.2d 1209, 1215 (7th Cir. 1970); *Pierce v. United States*, 414 F.2d 163, 169 (5th Cir.), *cert. denied*, 396 U.S. 960 (1969). We are not here concerned with such vital matters as a defendant's decision to take the stand, which might result in substantial and irrevocable prejudice. See *United States v. Padrone*, 406 F.2d 560 (2d Cir. 1969). Any possibility that the jury might believe that Venetucci's counsel deliberately tried to mislead them in his opening could have been dissipated by the court's explaining to

10. Venetucci asserts that his arguments against the wiretap would have been entirely different from those actually raised by the other defendants. He says he would have focused on the New York rather than the federal legislation (although the New York legislation was clearly authorized and conformed to the federal legislation), on the existence of probable cause for the first order (rather than its form) and the numerous extensions of the first order. We have considered these arguments but find them insufficient to change our already-expressed views.

the jury what had happened. Yet Venetucci made no request for an explanation. Under the circumstances the admission of the Venetucci transcripts was not reversible error.

Sufficiency of the Evidence

Under familiar principles, the trial court was required, before permitting the jury to consider hearsay declarations of one alleged conspirator as evidence against his alleged co-conspirator, to find by a fair preponderance of *non*-hearsay evidence that the latter was a party to the conspiracy. See *Glasser v. United States*, 315 U.S. 60, 74 (1942); *United States v. Geaney*, 417 F.2d 1116 (2d Cir.), *cert. denied sub nom. Lynch v. United States*, 397 U.S. 1028 (1969). Otherwise, a defendant could be convicted solely on the basis of hearsay evidence which he had had no opportunity to impeach or refute. See *Flintkote Co. v. Lysfjord*, 246 F.2d 368, 387 (9th Cir.), *cert. denied*, 355 U.S. 835 (1957). While the government's non-hearsay evidence against an alleged co-conspirator may be entirely circumstantial, see *United States v. Garguilo*, 310 F.2d 249, 253 (2d Cir. 1962), mere association with persons engaged in a criminal enterprise or even presence at the scene of their crime will ordinarily not be enough. There must be some basis for inferring that the defendant knew about the enterprise and intended to participate in it or to make it succeed. Compare *United States v. Cimino*, 321 F.2d 509 (2d Cir. 1963), *cert. denied*, 375 U.S. 974 (1964) ("mere meeting was no evidence [that persons were] conspirators") and *United States v. Fantuzzi*, 463 F.2d 683 (2d Cir. 1972) with *United States v. Cassino*, 467 F.2d 610 (2d Cir. 1972), *cert. denied*, 410 U.S. 913 (1973).

As to most defendants this threshold requirement as to admissibility of hearsay declarations of co-conspirators was clearly

met. The tapes, transcripts, surveillance, and other circumstantial evidence provided overwhelming non-hearsay evidence of a conspiracy to distribute heroin in which Cirillo and Murphy were suppliers, Sorrentino was a middleman, and Venetucci and Cesare were customers. Lilienthal, Gutierrez and Gaber argue, however, that there was insufficient non-hearsay evidence to permit the trial court to find by a fair preponderance of the evidence, which is the governing standard, that they had intended to participate in either the January or March transactions. Therefore, they say, it was reversible error to permit the jury to consider the incriminating hearsay declarations of the other co-defendants as evidence against them.

(a) *Lilienthal*

The non-hearsay evidence of Lilienthal's participation in the March transaction was clearly sufficient to permit the introduction of statements by co-conspirators in furtherance of the conspiracy. The principal item was Lilienthal's devastatingly incriminatory telephone conversation with Cirillo on March 15 in which Cirillo asked "I got to—I got to have it before the income tax is filled out. You got the paper that I half filled out?" (i.e., have you got the half kilo of heroin?), to which Lilienthal responded "Oh yeah, yeah, yeah," and advised Cirillo that he would stop by in about an hour. In a short while Lilienthal left his residence and later in the day his car was seen at Cirillo's house. Shortly after Lilienthal's visit to Cirillo's house, Cirillo and Murphy went to the White Castle parking lot near Sorrentino's house where they had failed to appear on the previous night because Cirillo had been unable to communicate to Lilienthal his request for those "half filled out" income tax forms (i.e., the half kilo of heroin). When they arrived at the parking lot Cirillo and Murphy were arrested and a package

containing a half kilo of heroin was discovered on Cirillo.

From this non-hearsay evidence, including Lilienthal's own statements and conduct, the jury could infer that he agreed to and did supply to Cirillo the half kilo of heroin needed for sale in the chain of distribution. The court acted properly, therefore, in admitting hearsay statements of co-conspirators made in furtherance of the conspiracy, including Cirillo's "statement to Sorrentino" during the aborted January transaction that "Teddy" (Lilienthal) was a supplier who was always a "million percent, nothing ever goes wrong" and another statement by Cirillo to Sorrentino before the March transaction to the effect that "my friend Ted [has] got some papers for you," (i.e., some heroin). These statements confirmed the non-hearsay evidence surrounding the meeting and warranted the jury's finding beyond a reasonable doubt that Lilienthal was a member of the conspiracy and a participant in the March transaction. See *United States v. Manfredi*, ——— F.2d ——— (2d Cir. Nov. 23, 1973), Slip Opin. 5593; *United States v. Ruiz*, 477 F.2d 918 (2d Cir. 1973); *United States v. Calabro*, 449 F.2d 885 (2d Cir. 1971), *cert. denied*, 405 U.S. 928 (1972).

(b) *Gutierrez*

Unlike Lilienthal, Gutierrez was never heard to discuss narcotics with any of the conspirators. The only independent non-hearsay evidence of Gutierrez's possible participation in the conspiracy related to the aborted January, 1973, transaction. On January 18th Venetucci, immediately after leaving his rendezvous with Cirillo, Murphy and Sorrentino at Sorrentino's mother's apartment, for two hours visited Gutierrez's home. At the conclusion of that meeting Venetucci drove back to rejoin

Cirillo, Murphy and Sorrentino. On January 22nd Venetucci visited with Gutierrez for four hours at the dress store of the latter's wife, with an interruption when Venetucci left and then returned only after checking for surveillance. Venetucci finally departed, driving evasively to Staten Island. There was no evidence whatsoever of what was discussed and of what transpired at these meetings, or of any possession of narcotics by Gutierrez. Nor was there any non-hearsay evidence of any participation by him in any purchase or sale. Clearly this proof was insufficient to permit the court to find by a fair preponderance that he had participated.

While the two visits raise suspicion, suspicion is not enough. For all we know Venetucci may have visited Gutierrez in an unsuccessful effort to induce him to become a member of the conspiracy. Possibly he was visiting him in an unsuccessful effort to borrow the money he needed in order to fulfill his unlawful commitment to Sorrentino and Cirillo. Absent some proof of knowing participation by Gutierrez in the unlawful venture we can conceive of any number of perfectly legitimate conversations or transactions that might have been the subject of the visits. Relying on *United States* v. *Manfredi, supra,* the government contends that in addition to Venetucci's visits there was circumstantial evidence in the form of "verbal acts" by Sorrentino that showed Gutierrez's participation in the conspiracy. It is true that in several Sorrentino-Cirillo telephone conversations Sorrentino referred to "Frankie" Venetucci's "partner." But these statements were clearly hearsay as to Gutierrez, who was not a party to the conversations and had no opportunity to cross-examine the declarant. They were therefore inadmissible against him in the absence of non-hearsay proof of his conscious participation in the conspiracy. To involve Gutierrez by reason of these references would be to sanction a finding of guilt on the basis of nothing more than association, which is impermissible.

Hearsay cannot be used as a supplement to, much less as a substitute for, insufficient non-hearsay proof.

Although *Manfredi* went quite far in admitting "verbal acts" of a co-conspirator, it is clearly distinguishable from the present case and cannot be expanded to admit Sorrentino's hearsay statements. In *Manfredi* the statements were those of the defendant Joseph LaCosa regarding *his own personal relations* with Manfredi as a narcotics supplier and could be coupled with his own evasive personal conduct upon the occasion of his visits to Manfredi's home. We treated LaCosa's statements as circumstantial evidence because they represented the declarant's *personal knowledge.* When added to the other corroboratory circumstances we concluded that they had a "ring of reliability." Compare *Manfredi* with *United States* v. *D'Amato,* ——— F.2d ——— (2d Cir. March 14, 1974), Slip Opin. 2199, 2205-08. No such "ring of reliability" exists here. In the first place the statements relied upon by the government are not those of Venetucci with respect to his personal dealings with Gutierrez, which might conceivably fit within *Manfredi,* but statements of Sorrentino, who had no personal relationship at all with Gutierrez. For all we know Sorrentino may have been basing his description of Gutierrez as Venetucci's "partner" on rumors that he had heard from persons other than Venetucci. To admit such rank "double hearsay" as "circumstantial evidence" or "verbal acts" would be to make a mockery of the "non-hearsay" threshold requirement.

The danger inherent in permitting such hearsay to be used as the basis for admitting still more hearsay declarations of co-conspirators is rather obvious. Aside from the lack of opportunity to cross-examine the declarant and the obvious second-hand nature of Sorrentino's statements, out-of-court statements by Venetucci himself were introduced which suggested that Gutierrez had not agreed to participate in the

narcotics scheme. Thus, in a conversation with Sorrentino on February 1, 1973, with respect to obtaining a loan to make up the $8,000 deficit in the price ultimately secured by Cirillo for the narcotics which Venetucci had agreed to buy, Venetucci expressly denied any understanding that "Frankie" was to share in payment of the deficit.

It may be that the "non-hearsay" threshold requirement for admission of hearsay declarations of co-conspirators, which had been liberalized through a series of modifications since its inception, compare *United States* v. *Nardone*, 127 F.2d 521, 523 (2d Cir.), *cert. denied*, 316 U.S. 698 (1942), and *United States* v. *Pugliese*, 153 F.2d 497, 500 (2d Cir. 1945), with *United States* v. *Geaney*, *supra*, will be relaxed even further to permit introduction of certain statements of co-conspirators regardless of their unavailability for cross-examination, subject to conditions that will be deemed sufficient to guarantee their trustworthiness. See Proposed Rules of Evidence for the United States District Courts and Magistrates, Rules 803(1)-(2). Until such a change is made, however, we must adhere to the standing rule which requires us to exclude hearsay where the threshold test has not been made.

Since the proof of Sorrentino's statements as to the reasons for Venetucci's visit to Gutierrez was inadmissible as evidence of Gutierrez's participation, the trial court could not properly consider it in applying the "fair preponderance" test with respect to Gutierrez. Cf. *Dutton* v. *Evans*, 400 U.S. 74, 88 (1970); *General Tire of Miami Beach, Inc.* v. *NLRB*, 332 F.2d 58, 61 (5th Cir. 1964). In light of the government's failure to adduce any non-hearsay evidence that Gutierrez was aware of the narcotics transaction, we are constrained to hold that it proved no more than mere association between Gutierrez and Venetucci, which cannot be the basis for an inference of guilt. See *United States* v. *Fantuzzi*, 463 F.2d 683, 689-90 (2d Cir.

1972); *United States* v. *Cimino*, 321 F.2d 509-10 (2d Cir. 1963, *cert. denied*, 375 U.S. 974 (1964); *United States* v. *Ventvena*, 319 F.2d 916, 949 (2d Cir.), *cert. denied*, 375 U.S. 940 (1963); *United States* v. *Stromberg*, 268 F.2d 256, 267 (2d Cir.), *cert. denied sub nom. Lassa* v. *United States*, 361 U.S. 863 (1959). See also *United States* v. *Glover*, 306 F.2d 594 (10th Cir. 1962).

(c) *Gaber*

The non-hearsay evidence of Gaber's participation in the March transaction was even less persuasive than that with respect to Gutierrez. It consisted only of (1) Gaber's presence with Cesare in the White Castle parking lot on the evening of March 14, (2) his presence there again on the evening of March 15 when Cesare met with Sorrentino, and (3) Gaber's statement later that evening when he and Cesare were stopped by police that he was in the neighborhood to see "Brother" Sorrentino. There was no showing that narcotics were ever discussed in Gaber's presence, Gaber did not act furtively or lie to the police when questioned. Nor did he commit any act suggesting that his association with Cesare was illicit in nature. Mere presence at a site where a narcotics sale has been planned, without some showing that the defendant knew of it, is not enough to satisfy the "fair preponderance" test.[11] See *United States* v. *Fantuzzi*, *supra*; *United States* v. *Cimino*, *supra*, and other decisions cited on page 3316.

The decisions relied upon by the government do not support its argument that there was sufficient non-hearsay evidence of Gaber's membership in the conspiracy to admit the hearsay

11. Cesare's statement in one of his March 14 telephone conversations with Sorrentino to the effect that he (Cesare) had "Gabe" (Gaber) with him added nothing to the government's proof of guilty knowledge on the part of Gaber.

declarations of alleged co-conspirators. In *United States* v. *Calabro*, 449 F.2d 885 (2d Cir.), *cert. denied*, 404 U.S. 1047 (1971), in affirming a narcotics conviction, we regarded "of critical importance" the fact that the defendant, who had been present at several meetings between the seller and the intended customer, an undercover agent, carefully scrutinized the agent and at one point actually frisked him.[12] And in *United States* v. *Ragland*, 375 F.2d 471, 473 (2d Cir. 1967), we upheld the admission of hearsay evidence against a defendant only after noting that a co-defendant had not only used the "slanguage" of narcotics dealings *in the defendant's presence* but had also explicitly referred to "narcotics." Compare *Calabro* and *Ragland* with *Ong Way Jong* v. *United States*, 245, F.2d 392 (9th Cir. 1957) (conviction reversed although defendant was constantly with co-defendant who sold narcotics); *Glover* v. *United States*, 306 F.2d 594 (10th Cir. 1962) (conviction refersed although defendant seen in vicinity of narcotics transaction between co-defendant and undercover agent) and *People* v. *Garcia*, 201 Cal. App. 2d 589, 20 Cal. Reptr. 242 (1962) (conviction reversed although defendant present at time of narcotics sale).

Since the government failed to adduce sufficient non-hearsay evidence of Gaber's participation in the conspiracy, his conviction must be reversed.

Variance Between Proof and Indictment

Venetucci, Lilienthal and Cesare[13] advance the argument,

12. It was not actually clear from the evidence that the defendant himself frisked the undercover agent. The frisking occurred when the agent was standing at the urinal in a restaurant's men's room as the defendant and his colleague passed behind him.

13. Gutierrez and Gaber also complain of a variance as to them but we need not consider these claims since we have already concluded that the evidence was insufficient to connect them with either the January or March transaction.

frequently asserted in conspiracy cases, see *United States* v. *Borelli*, 336 F.2d 376, 380 (2d Cir. 1964), *cert. denied sub nom. Cinquegrano* v. *United States*, 379 U.S. 960 (1965), that even assuming the involvement of each in one of the two transactions, the evidence showed two independent conspiracies, one in January and the other in March, 1973, rather than the single on-going conspiracy alleged. The issue turns on whether the proof warranted an inference that each of the three, in dealing with a member of the core group (Cirillo, Murphy and Sorrentino), was aware of, and thus knowingly furthered, the core group's overall on-going venture or partnership. See *Borelli*, *supra* at 385. Although a single transaction with, or function performed for, a representative of the core group may under some circumstances be insufficient to warrant an inference of knowledge of the extensive nature of the core group's activities, see *United States* v. *DeNoia*, 451 F.2d 979 (2d Cir. 1971); *United States* v. *Aviles*, 274 F.2d 179, 189-90 (2d Cir.), *cert. denied*, 362 U.S. 974 (1960); *United States* v. *Stromberg*, 268 F.2d 256, 267 (2d Cir.), *cert. denied*, 361 U.S. 863 (1959), we have recognized that it is "not an arbitrary rule which is to be applied rigidly and without reason." See *United States* v. *Agueci*, 310 F.2d 817 (2d Cir. 1962), *cert. denied*, 372 U.S. 959 (1963). Indeed, just recently we said that "it would be unrealistic to assume that major producers, importers, wholesalers or retailers do not know that their actions are inextricably linked to a large on-going plan or conspiracy." *United States* v. *Arroyo*, ——— F.2d ——— (2d Cir. Mar. 22, 1974), Slip Opinion. 2314-15.

We are not here confronted, however, with merely a single delivery or purchase on the part of each of these three appellants (Venetucci, Lilienthal and Cesare) which, without more, might not support knowledge of a broader conspiracy, see, e.g., *United States* v. *DeNoia*, *supra*, but with deeper involvement on the part of each of these participants. Venetucci met on at least two

occasions with all three members of the core group, took delivery of one kilogram of heroin and, when he and his partner were unable to make payment, redelivered the kilo and was informed that the core group had resold it elsewhere at an $8,000 loss, following which negotiations were conducted regarding payment of the deficit. From all of these circumstances—the large quantity, the number of meetings and his knowledge of the resale—the jury was entitled to infer that as a major retailer Venetucci knew that he was participating in a larger on-going venture. See *United States* v. *Arroyo*, ——— F.2d ——— (2d Cir. Mar. 22, 1974), Slip Opin. 2314-15.

In the cases of Lilienthal and Cesare the evidence shows, in addition to their participation in a transaction involving a large quantity, that they used narcotics code language in their dealings, Lilienthal making a delivery of a half kilo in response to Cirillo's request for "half-filled out" income tax papers and Cesare negotiating for the "sample of the dress." From these circumstances, including their use of pre-arranged code language, the jury could infer knowledge that they were participating in a continuing major business which extended in scope beyond the particular transaction and depended for its success upon a chain of distribution in which each principal played an essential part. *United States* v. *Bynum*, 485 F.2d 490, 495-96 (2d Cir. 1973); *United States* v. *Miller*, 381 F.2d 529, 533 (2d Cir. 1967).

Even assuming there was a variance between the government's proof and the indictment, we are directed to no specific prejudice resulting from the variance and we are convinced that there could have been none. Unlike *Kotteakos* v. *United States*, 328 U.S. 750 (1945), which involved 36 alleged co-conspirators and some 8 separate conspiracies to defraud the government in relation to FHA loans, here there were only 8 alleged co-conspirators and at most two separate conspiracies each of which

was proved beyond a reasonable doubt by evidence relating only to it. Moreover, the trial court cautioned the jury that "[w]hether or not a defendant was a member of a conspiracy must be determined on the evidence . . . as to his own actions, his own conduct, his own statements and declarations, his own connection with the acts, and conduct of the other alleged co-conspirators." In *Blumenthal* v. *United States*, 332 U.S. 539, 560 (1947), which, like this case, involved a relatively small number of alleged co-conspirators and conspiracies, the Court found that a similar instruction had reduced the risk of an impermissible transfer of guilt to a minimum.

Miscellaneous Other Points

(a)*The Contents of the Paper Bag*

Sorrentino argues that his conviction on Count 2 (distribution of one kilogram of heroin on January 18, 1973) must be reversed since the government offered no direct proof that the paper bag carried by Cirillo to the meeting with Murphy, Sorrentino and Venetucci at Sorrentino's mother's apartment on the evening of January 18 contained heroin. We disagree. There was ample circumstantial evidence that the bag contained heroin. The delivery of the bag was the result of Sorrentino-Cirillo telephone negotiations in narcotics jargon and was followed by angry discussions regarding Venetucci's failure to deliver the "thirty," (e.g., $30,000), the approximate going price for a 50% pure kilogram of heroin. Later Cirillo and Sorrentino agreed to get the "dress" (i.e., narcotics) off Venetucci.

(b) *The Introduction of the Cocaine Found on Murphy and Cirillo*

Appellants Murphy and Cirillo argue that the trial court should not have permitted the government to introduce the small quantities of cocaine found on them at the time of their arrest (in addition to the half kilogram of heroin found on Cirillo) since it was evidence of crimes other than those charged in the indictment. But here the cocaine was relevant to refute the position which the government could anticipate and which counsel for Cirillo actually tried to establish during cross-examination of government witnesses, i.e., that the heroin was planted on Cirillo as a frame-up by the arresting officers. See *United States* v. *Purin*, 486 F.2d 1363, 1367 (2d Cir. 1973); *United States* v. *Wright*, 466 F.2d 1256, 1258-59 (2d Cir. 1972), *cert. denied*, 410 U.S. 916 (1973). In any event admission of the cocaine as evidence of guilty knowledge on the part of Cirillo and Murphy was well within the trial court's wide discretion. See *United States* v. *Deaton*, 381 F.2d 114, 117-19 (2d Cir. 1967).

(c) *The Jury Charge*

During his charge to the jury the trial judge instructed that they should consider the wiretap evidence since he had determined that the wiretap orders were properly issued. "If I am wrong," he continued, "somebody else can reverse me, but you are bound to take my view of the law." Appellants Murphy and Cirillo argue that this statement, to which they excepted, impermissibly tended to establish a similar train of thought in the minds of the jurors—i.e., if they should render an erroneous verdict, someone else would reverse them. The unnecessary remark is confusing and conceivably could be interpreted several ways. However, even accepting the interpretation given to it by

appellants, we are satisfied that under the circumstances of this case it was clearly harmless, in view of the overwhelming evidence against Murphy and Cirillo, including the tapes, visual surveillance and arrest with a large quantity of narcotis in their possession.

Conclusion

The convications of appellants Gutierrez and Gaber are reversed. All other convictions are affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-against-

ALPHONSE CIRILLO, VINCENT MURPHY, et al.,
Defendants.

73-CR-352
June 27, 1973

Appearances:

HON. ROBERT A. MORSE
United States Attorney
Attorney for United States of America

By: GUY L. HEINEMANN, ESQ.
Assistant U.S. Attorney
of Counsel

HAROLD BORG, ESQ.
Attorney for Defendant Cirillo

ARNOLD E. WALLACH, ESQ.
Attorney for Defendant Murphy

JUDD, J.

MEMORANDUM AND ORDER

Defendants Alphonse Cirillo and Vincent Murphy, joined by certain of their co-defendants, have moved to suppress evidence obtained pursuant to New York State wire-tap orders. They are under indictment for the illegal sale of heroin and conspiracy to violate the Comprehensive Drug Abuse Prevention and Control Act of 1970.

The primary attack is based on the fact that Mr. Justice Shapiro's order did not expressly provide for "minimization." The interceptions which it authorized were, however, restricted to "communications [which] pertain to the commission of the crime hereinabove mentioned."

Facts

There were five orders concerning telephone facilities alleged to be used by defendant Cirillo, the first signed by J. Irwin Shapiro, Associate Justice, Appellate Division, Second Department, and the next four by Presiding Justice Samuel Rabin of the same Court. There were three orders concerning a telephone used by defendant Sorrentino, all signed by Mr. Justice Irwin Brownstein of the Supreme Court, Kings County. All the orders except the first contained an express direction to minimize the interception.

The first three orders concerning defendant Cirillo were based on lengthy affidavits by Detective Douglas LeVien, and the fourth and fifth Cirillo orders were based on lengthy affidavits by Detective James Garcia. The three Sorrentino orders were also based on lengthy affidavits by Detective James Garcia.

The first LeVien affidavit cited information from a registered informant, whose information in the past had led to several arrests and convictions. The informant said that he had learned

from defendant Cirillo that he brought in large quantities of heroin about four times a year, and had received 50 kilograms through Miami about three months before; and that he had seen a sample of heroin in Cirillo's living room and had heard conversations on the telephone about narcotic sales and prices. Confirmatory details from surveillance and other investigation were supplied.

Defendants have submitted a 31-page affidavit challenging the sufficiency of the LeVien and Garcia affidavits to satisfy the requirements of 18 U.S.C. § 2518. Defendants ask that the informant be produced in court for cross-examination. They assert that the order should not have been extended because no information was received concerning an anticipated 200 kilogram shipment. Much of the defense affidavit is devoted to denying the sinister interpretations put on intercepted conversations when detectives set forth the need for extensions of the wire-tap orders.

Finally, defendants complain that the orders did not require reports to the judges who signed them, as is permitted by 18 U.S.C. § 2518(6).

Notice was given to defendants Cirillo and Murphy on May 9, 1973, pursuant to CPL § 750.50(3) that eavesdropping had been conducted from October 31, 1972 to March 15, 1973.

The government has submitted an affidavit of the Assistant United States Attorney who participated in the joint investigation of the matter by the District Attorney of Kings County and the United States Bureau of Narcotics and Dangerous Drugs. He asserts that he informed the B.N.D.D. agent in charge of the investigation concerning the legal requirement that persons monitoring the wire-tap minimize the interception of any conversations not pertinent to the investigation. Special Agent Alexander Dovetko states that he personally visited the Cirillo wire-tap plant almost daily for an

hour or more and personally observed agents and officers turn off the recording and monitoring devices when clearly non-pertinent conversations were being received. He states also that he has examined the logs of the wire-tap and confirmed that a substantial number were turned off when it was determined that they were non-pertinent. He asserts that similar procedure was followed with respect to the Sorrentino wire-tap. A confirmatory affidavit was submitted by an Assistant District Attorney in charge of the Narcotics Bureau of the Kings County District Attorney's office, setting forth that he instructed the police officers who were monitoring the phone conversations that all recording and listening devices were to be turned off completely whenever non-pertinent conversations were intercepted.

This court has reviewed each of the wire-tap orders and the supporting affidavits.

The court has also read the logs of the two wire-taps. The letters "N/P" which frequently appear, clearly refer to "Non-Pertinent" conversations. These were not described in the logs, although it was not recited in many instances that the machine was turned off. A number of conversations could reasonably be interpreted as relating to narcotic transactions; some relate to gambling transactions; and some may not be pertinent to any crime.

Discussion

1. The constitutionality of the wire-tap statute is settled in this circuit and requires no further discussion. *United States* v. *Tortorella*, F. 2d (2d Cir. April 5, 1973).

2. The purpose of requiring a provision for minimization in a wire-tap order is to alert the persons who monitor wire-taps to the necessity of limiting invasions of privacy to those necessary to accomplish their mission. This purpose has been served if in-

vasion of privacy has been minimized, whether the magic word minimization is used in the wire-tap order or not. Justice Shapiro's order limited the interception to conversations relative to the crimes being investigated. Here also the persons monitoring conversations were instructed not to listen to personal conversations, and in fact minimized the interceptions.

The remedy to be imposed for failure to include a minimization clause or failure to minimize is not certain. The Eighth Circuit in *United States* v. *Cox*, 462 F.2d 1293, 1301 (1972), held that failure to minimize did not require suppression, stating:

> Clearly Congress did not intend that evidence directly within the ambit of a lawful order should be suppressed because the officers, while awaiting the incriminating evidence, also gathered extraneous conversations. The nonincriminating evidence could be suppressed pursuant to 18 U.S.C. § 2518(10)(a), but the conversations the warrant contemplated overhearing would be admitted.

Chief Judge Matthes held that the remedy provided by Congress for failure to minimize, in addition to suppression of non-incriminating evidence, is a civil suit under 18 U.S.C. § 2520 against the investigating officers for actual, liquidated and punitive damages for exceeding their authority.

The opposite conclusion was reached by Judge Waddy in *United States* v. *Scott*, 331 F.Supp. 233 (D. D.C. 1971), where, after finding a complete failure to minimize interception, he ordered all the wire-tap evidence suppressed.

The Second Circuit in *United States* v. *Bynum*, 475 F.2d 832 (1973), noted both the *Cox* and *Scott* cases, but specifically left open the issue of the appropriate remedy for failure to minimize, pending a more complete record to be developed on remand. A

different panel in the Second Curcuit in *United States* v. *Tortorella, supra,* F.2d cited the *Scott* case for the standards employed to determine whether minimization had been effective. The Court did not discuss the remedy for failure to minimize although it intimated that it would follow the *Scott* case.

The general rule in this circuit with respect to excessive seizures is that the property described in the search warrant is admissible, and only the items improperly seized should be suppressed. *United States* v. *Dzialak,* 441 F.2d 212, 216-17 (2d Cir. 1971); *United States ex rel. Nickens* v. *LaVallee,* 391 F.2d 123 (2d Cir. 1968).

Since even legitimate business conversations frequently begin with personal chit-chat, it is not possible to distinguish every personal conversation from an incriminating one. Moreover, in tracking down a wholesale transaction which takes place only at long intervals, it is necessary to listen to many conversations that may lead up to it, but not be directly pertinent. What is more significant is that the wire-taps produced a number of conversations which may expressly "pertain to the commission of the crime." In effect, defendants ask to suppress incriminatory conversations because nonincriminating conversations may also have been overheard.

Since the court has determined that the monitoring agents did in fact show a proper respect for privacy (see *United States* v. *Tortorella, supra,* slip op. 2688) and that Justice Shapiro's order satisfied the statutory requirements, it is unnecessary to decide what the remedy for failure to minimize should be.

3. The objection to the extension of the orders is without merit, since the statute fixes no limit on the number of extensions. The statute requires only that extensions be based on new applications and new findings by the issuing judge. The affidavits requesting extensions set forth adequate facts and sustain the orders.

4. The argumentative objections to the showing of probable cause and to the showing that other means of investigation were impractical does not require extended analysis. Wire-tap affidavits, like affidavits in support of a search warrant, should be interpreted in a practical manner and not be subject to later "nit-picking." *United States* v. *Ventresca*, 380 U.S. 102, 85 S.Ct. 751 (1965).

5. The production of the informant is not necessary, where the affidavits show that there was reason to credit his statements. *United States* v. *Harris*, 403 U.S. 573, 91 S.Ct. 2075 (1971).

6. A district court should not add to the instances in which a suspect is given immunity from a criminal trial because of the blunder of a law enforcement official.

Minor defects in state court wire-tap orders were held not to be fatal in *United States* v. *Poeta*, 455 F.2d 117 (2d Cir. 1972), and *United States* v. *Tortorello*, F.2d (2d Cir. April 5, 1973).

Multiplication of pretrial hearings is not in the public interest. No material issue has been raised which requires a hearing on defendants' motion.

It is ORDERED that the motion to suppress the wire-tap evidence be denied.

/s/ORRIN G. JUDD
U.S.D.J.

APPENDIX C

SUPREME COURT OF THE STATE OF NEW YORK APPELLATE DIVISION: SECOND DEPARTMENT

IN THE MATTER OF THE APPLICATION

-of-

EUGENE GOLD, DISTRICT ATTORNEY OF THE COUNTY OF KINGS, FOR AN EAVESDROPPING WARRANT PERMITTING THE INTERCEPTION OF COMMUNICATIONS TRANSMITTED OVER TELEPHONE INSTRUMENT

AREA CODE 212 613-8570

EUGENE GOLD, District Attorney of the County of Kings, State of New York, having submitted an application for an Eavesdropping Warrant with respect to communications transmitted over the telephone instrument bearing the number Area Code 212 631-8570.

Upon reading the affidavit of EUGENE GOLD, sworn to the 31st day of October, 1972; the affidavit of DOUGLAS Le VIEN, sworn to the 31st day of October; and it appearing therefrom that there is probable cause to believe that evidence of the commission of the crime of Violation of Article 220: Dangerous Drug Offenses, of the Penal Law of the State of New York, may be obtained by the interception of communications transmitted

over the telephone instrument aforesaid; it is determined on the basis of facts submitted herein that:

There is probable cause to believe that Alfonse C. Circillo, has committed, is committing or is about to commit the crime of Violation of Article 220: Dangerous Drug Offenses, of the Penal Law of the State of New York, by reason of the fact that known conversations concerning the illegal sale of narcotics in Violation of Article 220: Dangerous Drug Offenses, of the Penal Law of the State of New York, had with the confidential informant referred to herein involving discussions concerning price, amount and place of sale were had;

There is probable cause to believe that communications concerning the aforesaid crime will be obtained by the interception of messages transmitted over the said telephone instrument.

Normal investigative procedures have been tried and have failed and it reasonably appears to be unlikely to succeed if tried or to be too dangerous;

There is probable cause to believe that the facilities from which, and the place where, the telephone communications are to be intercepted are being used, or are about to be used, in connection with the commission of the crime of Violation of Article 220: Dangerous Drug Offenses, of the Penal Law of the State of New York, and are commonly used by Alfonse C. Cirillo, whose telephone communications are sought to be intercepted.

All of which shows to my satisfaction that grounds exist for the issuance of an Eavesdropping Warrant to intercept the communications of Alfonse C. Cirillo transmitted over the aforesaid telephone instrument, it is

ORDERED that the District Attorney of Kings County and his duly designated agents be, and they hereby are, authorized and empowered to intercept, listen to, overhear, eavesdrop and

make copies and permanently preserve by mechanical or electronic device the telephone communications of Alfonse C. Cirillo transmitted over the telephone instrument bearing the number Area Code 212 631-8570, located in premises 41-86 Glenwood Street, a one family private house in Little Neck, County of Queens, New York, New York, and listed in the records of the New York Telephone Company in the name of Alfonse Cirillo, and which communications pertain to the commission of the crime hereinabove mentioned and by reason of the fact that the above referred conversations had with a confidential informant and Alfonse C. Cirillo concerning the sale of narcotics in Violation of Article 220: Dangerous Drug Offenses, of the Penal Law of the State of New York, herein mentioned, and by reason of the fact that known conversations concerning the illegal sale of narcotics in Violation of Article 220: Dangerous Drug Offenses, of the Penal Law of the State of New York, had with the confidential informant referred to herein involving discussions concerning price, amount and place of sale were had, and it is further

ORDERED that the District Attorney of Kings County, and his duly designated agents be, and they hereby are, authorized to cut, break, tap and make connection with any and all wires leading to and from the said telephone instrument and to do all things necessary to permit the interception of communications transmitted thereon and for the preservation of such communications by mechanical or electronic devices with authority to make secret entry upon premises in which the aforesaid telephone instrument is located, and to install any eavesdropping device if such entry becomes necessary to execute this Warrant, and it is further

ORDERED that any and all intercepted communications recorded and preserved by the District Attorney of Kings County and his duly designated agents shall not be divulged except in

accordance with law and when not otherwise privileged by law, and it is further

ORDERED the effective date of this Warrant is October 31st, 1972, and shall not automatically terminate when the communication hereinabove described shall have been obtained but said interception shall continue until November 29th, 1972, the maximum number of days permitted by statute and the daily interception while this Warrant shall remain effective shall be for twenty-four (24) hours on each day.

Dated: Brooklyn, New York
October 31st, 1972

Signed
Associate Justice of the
Appellate Division:
Second Department

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF NEW YORK

United States of America

v.

No. 73 CR-352

ALPHONSE CIRILLO, also known as "Fuzzy"

On this 30th day of JULY, 1973 came the attorney for the government and the defendant appeared in person and with counsel, Harold Borg, Esq.

IT IS ADJUDGED that the defendant upon a verdict of guilty has been convicted of the offense of violating T-21, U.S.C. Secs. 841(a)(1) and T-18, U.S. Code, Sec. 2, in that from on or about and between Dec. 6, 1972 and March 16, 1973, both dates being approximate and inclusive, the defendant, with others, did unlawfully conspire with each other, to distribute and to possess quantities of heroin, A schedule I narcotic drug controlled substance as charged in counts 1, 2, 7 & 9 and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of[4] 14 years, 9 months on counts 1 and 2 to run concurrently plus special parole term of 10 years. Defendant fined $10,000 on count 1; on counts 7 & 9 defendant is sentenced to imprisonment for a period of 10 years pursuant to T-18, U.S. Code, Sec. 4208(a)(2) to run concurrently and to run consecutively with sentence imposed in counts 1 & 2 plus special parole term of 10 years to run concurrently with special parole term imposed in counts 1 and 2. Defendant fined $10,000.00 on count 9.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

s/ Orrin G. Judd
United States District Judge.

The Court recommends commitment to[6] a state institution to permit credit for present confinement.

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1. Insert "by [name of counsel], counsel" or without counsel; the court advised the defendant of his rights to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel." 2. Insert (1) "guilty and the court being satisfied there is a factual basis for the plea," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a finding of guilty," or (4) "nolo contendere," as the case may be. 3. Insert "in count(s) number " if required Enter (1) sentence or sentences, specifying counts if any; (2) whether sentences are to run concurrently or consecutively and, if consecutively, when each term is to begin with reference to termination of preceding term or to any other outstanding unserved sentence; (3) whether defendant is to be further imprisoned until payment of the fine or fine and costs, or until he is otherwise discharged as provided by law. 5. Enter any order with respect to suspension and probation. 6. For use of Court to recommend a particular institution.

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF NEW YORK

United States of America

v.

No. 73 CR-352

VINCENT MURPHY a/k/a "Murph"

On this 12th day of October, 1973 came the attorney for the government and the defendant appeared in person and with counsel, S. Laifer, Esq.

IT IS ADJUDGED that the defendant upon a verdict of guilty has been convicted of the offense of violating T-21, U.S.C. Secs. 841(a)(1)&T-18, U.S.C. Sec. 2 in that from on or about and between Dec. 6, 1972 and Mar. 16, 1973, the defendant, with others, did unlawfully conspire with each other, to distribute and to possess quantities of heroin, a Schedule I narcotic drug controlled substance as charged in counts 1, 2, 7 & 9 and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to

the custody of the Attorney General or his authorized representative for imprisonment for a period of 10 years to run concurrently on counts 1, 2, 7 & 9 plus a special parole term of 7 years. Defendant fined $5,000 on count 9. Defendant continued on bail pending appeal.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

s/ Orrin G. Judd
United States District Judge.

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1. Insert "by [name of counsel], counsel" or without counsel; the court advised the defendant of his rights to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel." 2. Insert (1) "guilty and the court being satisfied there is a factual basis for the plea," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a finding of guilty," or (4) "nolo contendere," as the case may be. 3. Insert "in count(s) number " if required Enter (1) sentence or sentences, specifying counts if any; (2) whether sentences are to run concurrently or consecutively and, if consecutively, when each term is to begin with reference to termination of preceding term or to any other outstanding unserved sentence; (3) whether defendant is to be further imprisoned until payment of the fine or fine and costs, or until he is otherwise discharged as provided by law. 5. Enter any order with respect to suspension and probation. 6. For use of Court to recommend a particular institution.